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Nos. 636 and 651

In the Supreme Court of the United States

OCTOBER TERM, 1935

JAMES WALTER CARTER, PETITIONER

v.

CARTER COAL COMPANY ET AL

GUY T. HELVERING ET AL., PETITIONERS

v.

JAMES WALTER CARTER ET AL.

RESPONSE OF GOVERNMENT OFFICER RESPONDENTS IN NO. 636 AND PETITIONERS IN NO. 651 IN OPPOSITION TO MOTION OF JAMES WALTER CARTER FOR IMMEDIATE ISSUANCE OF MANDATE AND FOR COSTS

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By his motion filed May 25, 1936, petitioner James Walter Carter moved the Court:

(1) To cause the immediate issuance of the mandate to be directed to the court below pursuant to the judgment of this Court entered May 18, 1936, and

(2) To allow him his costs and direct the Clerk in the preparation of the mandate to include there-

in costs in favor of said James Walter Carter, petitioner in No. 636 and respondent in No. 651, against Guy T. Helvering, M. Hampton Magruder, Clarence C. Keiser, John B. Colpoys, Homer S. Cummings, Stanley Reed, and Leslie C. Garnett, respondents in No. 636 and petitioners in No. 651, or solely against M. Hampton Magruder, one of the respondents in No. 636 and one of the petitioners in No. 651.

This response is directed to the above motion. For convenience hereafter the Government officers will be referred to as "Government officer respondents", although it is to be understood that this response is intended to apply to them as respondents in No. 636 and petitioners in No. 651.

I

IMMEDIATE ISSUANCE OF MANDATE

The Government officer respondents have no objection to the immediate issuance of the mandate if the Court desires to enter an order shortening the time for issuing the mandate as provided in Rule 34 of the Rules of this Court.

II

ALLOWANCE OF COSTS

The Government officer respondents oppose the motion insofar as it asks that costs be allowed petitioner and that the Clerk be directed in the preparation of the mandate to include therein costs

in petitioner's favor to be paid by the Government officer respondents or solely by one of the Government officer respondents, M. Hampton Magruder.

The Government officer respondents submit that they were named as parties to this litigation solely because of the public offices which they hold, and that there is no reason apparent from the motion, or otherwise, why they should be assessed individually the costs of this litigation.

In this connection it should be pointed out (1) that the Government officer respondents did not institute this suit, nor did they do anything unconstitutional or illegal which caused it to be instituted; (2) that the Government officer respondents had not at the time the bill of complaint was filed, nor have they since, attempted to enforce any of the provisions of the Bituminous Coal Conservation Act of 1935 against petitioner; (3) that although the Act confers certain duties upon the Government officer respondents solely by virtue of the offices which they hold, this suit was not based upon any alleged wrong or injury done petitioner by such respondents under the purported authority of the Act, or otherwise, but merely upon allegations that after a certain date in the future respondents would have duties under the Act which if performed would irreparably injure petitioner; (4) that not only had the Government officer respondents made no attempt to enforce the Act against petitioner when this suit was instituted but, more-

over, at the time this suit was instituted the Act had not become effective as to any provision enforceable by any of the Government officer respondents; and (5) that it is obvious that at the time of the institution of this suit the Government officer respondents could not have saved or prevented petitioner from bringing this suit by any action or refusal to take action under the statute on their part, even if they had been so minded, because the suit was brought before the effective date of their statutory duties.

In view of the above, it is submitted that it would not be equitable to direct that the Government officer respondents individually pay the costs of this suit merely because, at the time this suit was brought, they happened to be holding public offices which, if the Bituminous Coal Conservation Act of 1935 had become effective as against petitioner, would have required them to perform certain duties with respect to the enforcement of the Act which would have affected petitioner.

Petitioner refers to the bulk of the record and states that this was largely due to the fact that the Government officer respondents put in evidence a great deal of testimony in support of their defenses. It is submitted that the Government officer respondents owed a duty to the Court and to the public to make a full and complete defense of the constitutionality of the Bituminous Coal Conservation Act of 1935, and to put in evidence such

factual material as would aid the Court in reaching a decision. The fact that such a defense was made furnishes no warrant for requiring the Government officer respondents individually to bear the costs of the litigation. This Court has recognized in the instant case and in many other cases (*Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Nebbia* v. *New York*, 291 U. S. 502; *Borden's Co.* v. *Baldwin*, 293 U. S. 194; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164; *Wilshire Oil Co.* v. *United States*, 295 U. S. 100) that the consideration of evidence of the type introduced by the Government officer respondents is appropriate and often necessary to the decision of constitutional questions which depend on fact. The fact that the Government officer respondents endeavored to put in the record evidence which would be an aid to the court below and to this Court in determining the constitutional questions presented by petitioner's bill should not now be used as a reason for assessing costs against them.

There is no more reason in equity or fairness why petitioner should recover his costs in this action than there would be if the suit had happened to be against the United States. Rule 32 (4) of the Rules of this Court provides that no costs shall be allowed either for or against the United States except where specially authorized by statute and directed by the Court. The Government officer respondents submit that no reason is apparent why

they as individuals should be assessed the costs of this action because it happened to arise under a procedure wherein they instead of the United States were named as the defendants.

The Government officer respondents represented the interests of the United States in this litigation and they had no personal interest whatsoever in its outcome. This Court has recognized that in such a situation a Government officer should not be taxed for costs. In *Hauenstein* v. *Lynham*, 131 U. S. (Appendix) CXCI, this Court had under consideration a motion to correct a judgment as to costs. This Court said:

> This motion is denied. The defendant in error was sued in his official character, as escheator for the Commonwealth of Virginia. He was a public officer of the State, and he held the funds sued for in that capacity. He was charged with no official delinquency. Under such circumstances he cannot be made liable personally for the costs of the plaintiffs. The court below was right, therefore, in confining the judgment for costs to the funds in his hands as escheator.

The decision of this Court is in accord with the weight of authority, which is that a public officer is not liable for the costs of litigation to which he is a party where he represents therein the public interests, and the litigation is not made necessary by any negligence or misconduct on his part. *Board*

of Public Utility Commissioners of New Jersey v. *Plainfield Union Water Co.*, 30 F. (2d) 859 (C.C.A. 3rd, 1929), certiorari denied, 279 U. S. 858; *Wyse* v. *Yellott*, 119 Md. 463; *General Board* v. *Robertson*, 115 Va. 527; *State ex rel Rusk* v. *Budge*, 15 N. Dak. 205; *Fitch* v. *Hay*, 112 App. Div. (N. Y.) 736; *C. & O. Railway Co.* v. *Harmon*, 159 Ky. 59; *People ex rel Simpson Co.* v. *Kempner*, 154 App. Div. (N. Y.) 674; *Matter of Markland* v. *Scully*, 203 N. Y. 158; *O'Connor* v. *Walsh*, 83 App. Div. (N. Y.) 179; *Scrafford* v. *Gladwin County Supervisors*, 42 Mich. 464.

Petitioner, however, suggests three reasons why he should be allowed costs. These will now be discussed in order.

(1) Petitioner states that the Government officer respondents in No. 636 and petitioners in No. 651 are sued in their individual capacities and that the suit brought by petitioner is not a suit against the United States. Petitioner then states (Motion, p. 6) that it is settled law that an "attempt of a Government officer to enforce an unconstitutional statute is a proceeding which he undertakes without authority and constitutes an illegal act which strips him of his official character and subjects him in his person to the consequences of his individual conduct." The cases cited by petitioner in support of this proposition are *Ex parte Young*, 209 U. S. 123, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

It should be pointed out that, applying the test of petitioner's own language, the instant case on the facts (as already noted) does not involve "any attempt of a Government officer to enforce an unconstitutional statute", because these Government officer respondents had made no attempt to enforce the Act, nor has any one of them done any act "which strips him of his official character and subjects him in his person to the consequences of his individual conduct."

Moreover, neither of the cases cited involved any question of costs. *Ex parte Young,* insofar as even remotely pertinent here, simply holds that action by a state official under an unconstitutional statute does not affect the state in its sovereign or governmental capacity. *Philadelphia Co. v. Stimson* did not even involve an unconstitutional statute. That case arose upon a bill to set aside certain harbor lines in Pittsburgh so far as they encroached upon the complainant's land and to restrain the Secretary of War from causing criminal proceedings to be instituted against complainant because of his reclamation and occupation of land outside the prescribed limits. The suit was based upon allegations that the Secretary of War had exceeded his stafutory authority. With respect to the contention of the defendant, raised upon demurrer, that the proceeding was virtually a suit against the United States, the Court held that such was not the case;

that the proceeding merely challenged the authority of the Secretary to do the acts in question. Thus, the Court said (pp. 619–620):

> If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.

Thus, the above case merely supports the established doctrine that Government officials can be restrained from exceeding their authority—a proposition of undisputed validity.

(2) Petitioner next argues that there is precedent for allowing costs against the Government officer respondents. His sole reliance in this regard is upon the cases of *United States ex rel. McBride* v. *Shurz*, 102 U. S. 378, and *Hill* v. *Wallace*, 259 U. S. 44.

As for *United States ex rel. McBride* v. *Shurz,* it should be observed that this case arose on a petition for mandamus to compel the Secretary of the Interior to deliver a patent to petitioner. The patent had been duly signed, sealed, countersigned, and recorded, but it had been wrongfully withheld from the relator. The Court held that the relator was entitled to possession of the patent and that a writ of mandamus was the appropriate remedy to enforce the right. Subsequently, a motion was made for judgment against the defendant for costs. This motion was granted and the relator was given judgment for costs, the Court saying (p. 407):

> Our first impression was that as the defendant was sued in regard to the manner in which he had discharged certain official duties as Secretary of the Interior, in which no intentional wrong was charged or proven against him, it would be unjust to make him pay the costs of the proceeding out of his own pocket.
>
> But a careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights.
>
> In *Kendall* v. *United States* (12 Pet. 524), the leading case establishing the right of a citizen to the use of the writ of *mandamus* to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that, as in the present

case, was one enjoined upon a cabinet officer, which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court, as shown by the report of the case, rendered judgment for costs against him.

In *United States* v. *Boutwell* (17 Wall. 604), which was the case of a writ of *mandamus* against the defendant as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said: "It is the personal default of the defendant that warrants the impetration of the writ, and if a peremptory writ of *mandamus* be awarded, the costs must fall upon the defendant." And it is argued that as it would be unjust to make the successor in office of the delinquent secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate.

We cannot, in the face of these cases, refuse the order for costs, however much we might wish it were otherwise. There may be a contingent or other fund of the department out of which they can be paid. If there is none, Congress may provide for it or enact generally that when the officers of the government are sued with reference to the manner in which they have performed or failed to perform their official duties, they, as in revenue seizures and similar cases, shall be relieved from the expense of the suit if they have acted with good motives and upon reasonable grounds.

The relator must have judgment for his costs.

It will be noted that both of the cases cited in the above opinion are mandamus cases. In *United States* v. *Boutwell,* 17 Wall. 604, the Court said (p. 607):

> The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, *what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ.* If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and *it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right.* Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct de-

> mand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. *Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant.* (Italics supplied.)

It is clear that the present case is far removed from those mandamus cases that involve a "personal default" of the defendant. The mandamus cases are limited on their facts to failure of the defendant to perform a ministerial duty imposed upon him by law. There may be reasons why a defendant in such a case should pay costs if the writ issues.[1] But no failure to perform a ministerial duty is involved in the instant case, and the mandamus cases are inapplicable.

The only case which petitioner cites in this connection, other than the mandamus cases, is *Hill* v. *Wallace*, 259 U. S. 44. As to that case, petitioner

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[1] The mandamus cases are actions at law and costs follow as a matter of right, while the instant case is a suit in equity and costs are awarded in the discretion of the court. Furthermore, the United States is of necessity an adverse party to the defendant officer in a mandamus proceeding, while in this case the United States, although it is not a formal party defendant, is in reality the only party whose interests are affected by the injunction which petitioners sought.

points out (Motion, p. 8) that "the mandate carried costs in favor of the successful stockholder." The facts are that the mandate in that case ordered that the complainants "recover against the said defendants one hundred and eighty-one dollars and ten cents for their costs herein expended and have execution therefor." The record in that case shows that the defendants were the Secretary of Agriculture, the Commissioner of Internal Revenue, the United States Attorney for the Northern District of Illinois, the Collector of Internal Revenue for the First District of Illinois, the Board of Trade of the City of Chicago, the President of the Board of Trade, two Vice-Presidents of the Board of Trade, 15 individual directors of the Board of Trade, and the Secretary of the Board of Trade. Thus there were altogether 23 defendants, only 4 of whom were Government officers. The mandate did not distinguish between the Government officers and the private citizens who were defendants but simply ordered that the defendants should pay $181.10 costs. It does not appear that the Court ordered that any of the relatively small costs in that case should be paid by the 4 Government officer defendants.

(3) Petitioner further asserts (Motion, p. 9) that "there is an undoubted availability of funds at the disposal of such officers to pay such judgment." Petitioner further suggests that the Government officer respondents would not have to pay

the costs individually since the Collector of Internal Revenue for the Collection District of Maryland is one of the Government officer respondents, and petitioner asserts that he could effect payment from the Treasury by obtaining a certificate of probable cause pursuant to Title 28, U. S. C., Section 842 (R. S., Sec. 989). That section reads as follows:

> When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (R. S. § 989.)

But it is by no means clear that the above section would apply to the present case. It does not seem that the allegations or proof show this suit to be one against a collector "for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury." It is therefore quite doubtful that the

above section could be construed to cover the instant case.

No other procedure is provided by statute by which it is clear that the Government officer respondents other than the Collector of Internal Revenue could be reimbursed for any costs taxed against them.

CONCLUSION

It is respectfully submitted that petitioner's motion should be denied insofar as it seeks to have costs assessed against the Government officer respondents.

STANLEY REED,
Solicitor General.
JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
Special Assistant to the Attorney General.
JAMES C. WILSON,
Special Attorney.

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